

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-15-0029

)

) **COMMENT OF ARIZONA**

Petition to Add Rule 32.13, Arizona
Rules of Criminal Procedure

) **ATTORNEYS FOR CRIMINAL**

) **JUSTICE REGARDING PETITION**

) **TO ADD RULE 32.13, ARIZONA**

) **RULES OF CRIMINAL**

) **PROCEDURE**

)

)

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of

criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ opposes the proposed addition of Ariz. R. Crim. P. 32.13. AACJ has read the comments submitted by the Maricopa County Public Defender and the City of Phoenix Public Defender, and AACJ agrees with those comments in their entirety. Rather than rehash those comments, AACJ adopts their reasoning by reference. AACJ offers these additional concerns with the petition.

A. The Petition in Support of Proposed Rule 32.13 Offers No Substantial Reason why the Current Version of Rule 32 has Failed in Limited Jurisdiction Courts

When Rule 32 was overhauled in 1975, it purported to cover all potential claims that could be raised in post-conviction proceedings. This all-inclusive character of the rule was intended as a substitute for the writ of *coram nobis* that was abolished at that time. Several amendments to Rule 32 was amended in 1992, many of which pertained to the limitation on post-conviction proceedings if not raised in a timely manner. Rule 32.2(b)'s exception to preclusion for claims under Rule 32.1(d), (e), (f), or (g) was specifically narrowed so as to require the petitioner to act diligently in bringing the claim forth, and Rule 32.4(a) imposed strict time limits for filing a notice of post-conviction relief that would commence the proceedings.

The current version of Rule 32 permits trial courts to dispense of untimely notices of post-conviction relief in a summary fashion. Trial courts may not only dismiss untimely notices, but they are also absolved from the requirement of appointing counsel in such cases. *State v. Harden*, 228 Ariz. 131, 263 P.3d 680 (App. 2011). Although no court can ever stop a petitioner from filing a Rule 32 petition is untimely or repetitive that attempts to raise claims that are properly precluded, the courts have all the tools they need for finding that the claims are untimely and/or precluded. No rule can be said to be perfect, but Rule 32 aims to provide a clear avenue for raising post-conviction claims, from capital cases to the lowest-level misdemeanors.

Against a backdrop of a Rule 32 procedure that has been largely successful, Petitioner asks for a new rule for limited jurisdiction courts. Petitioner makes a conclusory statement that “[t]his one-size-fits-all rule is not proportionate to limited court offenses and the need to rationalize the fit between the post-conviction review procedures and minor offense adjudication is long overdue.” *Petition* at 1. Petitioner’s only example of a failure in the current system is: “the Rule 32.7 informal conference within 90 days of appointment of counsel and such are not well suited to how misdemeanors and petty offense violations are processed in limited courts.” *Id.*

Petitioner neglected the key opening sentence in Rule 32.7: “the court *may* at any time hold an informal conference *to expedite the proceeding*.” Explicit within this sentence is the use of the word “may,” which gives the trial judge discretion whether the hearing should be held, as well as the purpose of the hearing, which would be to expedite proceedings. If a judge felt that such a hearing would not serve that purpose, then a judge is in no way required to hold that hearing.

B. Several Provisions of Proposed Rule 32.13 Would Undermine the Core Purpose of Rule 32

The language of Proposed Rule 32.13 is flawed in numerous respects (including but not limited to several grammatical errors). Most critically, the proposed comments to each subsection are actually arguments in favor of the petition and not proper for publication as a comment. All of the comments should be rejected out of hand for that reason. As for the text of the rule, the flaws are as follows:

a. Rule 32.13(a)

The text of this subsection contradicts itself in that the petition must be filed within sixty days, yet “no post-conviction petition shall be filed while petitioner’s case is already pending on appeal.” As the appellate process typically takes longer than sixty days, Rule 32.13(a) would make it impossible for any non-pleading defendant to seek relief both on direct appeal and in post-conviction proceedings.

The requirement of filing a motion to withdraw a plea of guilty or no contest pursuant to Rule 17.5 is misguided for many reasons. First, many convictions occur at trial, not upon a change of plea. Second, defense counsel's decision not to file a Rule 17.5 motion may be due to ineffective assistance of counsel, which can only be raised in Rule 32 proceedings. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Third, the proposed rule incorrectly assumes that all Rule 32 grounds are raisable in a Rule 17.5 motion, but such motions may only be filed "when necessary to correct a manifest injustice." On the contrary, often the Rule 32 petition alleges that the trial judge abused his discretion at sentencing; and once sentence is pronounced in open court, it is too late to file a Rule 17.5 motion.

b. Rule 32.13(b)

This rule not only shortens the time for the State to respond to an unrealistically-short limit of twenty days, but it completely strips the petitioner of the right to reply. The party with the burden of proof—in this case, the petitioner—always gets the right of reply for the very reason that the party has the burden. Other than to shorten the time frame for disposition, Petitioner offers no valid reason to deprive petitioners of the right of reply.

c. Rule 32.13(c)

This subsection ostensibly seeks to reduce costs as well as judicial resources, but the mandate that a petitioner's appendix must include audio recording and not

transcript may actually increase judicial time spent on reviewing an appendix. When a trial judge receives a petition, which makes factual allegations and cites to sources contained in the appendix, it is significantly easier for a judge to review the relevant pages of the transcript than to pull up an audio file. This subsection is also disorganized in that it bounces between several unrelated issues.

d. Rule 32.13(d)

Petitioner asks this Court to vitiate the right to an evidentiary hearing under Rule 32.6(c), with no grounds stated. Due process absolutely requires a litigant have a fair opportunity to prove his or her claims. Nothing in the “comment” to this rule explains why such a drastic step is necessary or advisable. It is inconceivable that such a provision could survive a constitutional challenge on either due process or right to appeal grounds.

e. Rule 32.13(e)

While a motion for rehearing is not constitutionally required, eliminating such a procedure by law is highly unusual. Other than to get the case over and done with and out of the limited jurisdiction court, it is inconceivable how a trial court would suffer from a rule permitting motions for rehearing. Judges are not required to rehear the case just because a party files a motion; the judge can simply deny the motion.

Furthermore, this subsection refers to reviewing the petition and its merits “by available appellate procedure,” and never explains what that “available appellate

procedure” is. Considering that Petitioner envisions an entirely new system for reviewing Rule 32 petitions in limited jurisdiction court, it cannot be assumed that Petitioner expects all other aspects of the procedure to be the same as before.

CONCLUSION

This rule change petition is based on the flawed premise that Rule 32 petitions are a waste of time in limited jurisdiction courts. A misdemeanor conviction may be a less serious offense, but the collateral consequences of that conviction could be drastic (e.g., loss of driver's license for DUI, prohibited from possessing a firearm under federal law for a domestic violence conviction). Most importantly, for the defendant who was wrongfully convicted or sentenced, Rule 32 is the defendant's opportunity—guaranteed by article II, section 24 of the Arizona Constitution—to seek redress for such violations. For these reasons, AACJ respectfully requests this Court reject the petition to add Rule 32.13.

DATED: May 20, 2015.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/
David J. Euchner

This comment e-filed this date with:

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